APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 22
HCA/2018/000255/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL AGAINST CONVICTION

by

DAVID SCOTT

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C M Mitchell, QC; Livingstone Brown, Solicitors, Glasgow
Respondent: A Prentice, QC, AD; Crown Agent

23 March 2021

Introduction

[1] On 10 May 2018 at the High Court of Justiciary sitting at Glasgow the appellant was convicted of the murder of Euan Johnston on 15 November 2016. He was sentenced to life imprisonment with a punishment part of 22 years. During the trial the libel against the appellant's co-accused was withdrawn and he was acquitted. The indictment was in the following terms:

> "On 15 November 2016 at the junction of Shield Road and Scotland Street, both Glasgow, you DAVID SCOTT did, while acting with another or others meantime to the prosecutor unknown, assault Euan Johnston, c/o Police Scotland, Baird Street, Glasgow and did repeatedly discharge a firearm at him and repeatedly shoot him in the head and you did murder him."

[2] He appeals against his conviction on two grounds. The first is that the trial judge erred in refusing his no case to answer submission in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 and the second is that he was defectively represented in connection with the agreement of a joint minute

[3] The appeal process has had a long and chequered history but it would serve no purpose to narrate that here. Suffice it to say that despite the protracted nature of this process the issues for determination are in relatively narrow compass.

The circumstances of Mr Johnston's death

[4] On the evening of 15 November 2016 Mr Johnston attended a restaurant on St Andrews Road in the north of Glasgow with a friend, BMcM. Mr Johnston, upon leaving the restaurant at approximately 2335 entered his vehicle, an Audi RS4, and drove in the direction of Shields Road. Whilst at traffic lights at the junction of Shields Road and Scotland Street he was struck in the head by gunshots fired at him from a blue Audi Q5 and died as a result on 16 November 2016. The Q5 was found, destroyed by fire, near Bracken Street in the north of the city later that day.

Evidence at trial

[5] The case against the appellant was circumstantial. It focused on being able to link the shooting to the burned out Q5 and then by linking the Q5 to the appellant. The appellant, as he was entitled to do, chose not to give evidence. The following is a summary of the evidence led at trial, insofar as it is relevant to the current appeal,

Evidence of DC Sheila MacDonald

[6] Amongst other things DC MacDonald spoke of her viewing of CCTV footage of various locations close to the locus. This recorded movements of the deceased's Audi, the Audi Q5, the deceased and his companion BMcM and three people described as "males" by DC MacDonald.

[7] At 2244 the deceased's Audi travelled along St Andrews Road. The passenger was BMcM. Both he and the deceased entered the Red Pepper restaurant at 2246. At 2330 the Q5 turned from Shields Road onto St Andrews Road, travelling past the Red Pepper. Two minutes later it performed a 3-point turn and travelled again towards and past the Red Pepper.

[8] At 2333 the Q5 was shown parking in McCulloch Street, a dead end at the end of which there is a wooded area giving a view of the Red Pepper. The car remained stationary for a period of 25 seconds then performed a U-turn and drove back up McCulloch Street in the direction from which it had come. Although it was not caught on camera, it was assessed that a person called male 1 had exited the Q5, presumably at the point at which it was stationary. In oral submissions Ms Mitchell QC highlighted the fact that this was only an assessment. In our opinion, however, nothing turns on that. Whether the male alighted from the car or was met there was of no moment, given the evidence of his clear association with the car and with one person who was seen to alight from it.

[9] Between 2334 and 2336 the deceased and BMcM finished their meal, paid the bill and exited the restaurant onto St Andrews Road.

[10] At 2337 hours the Q5 was stationary with its lights off at the end of McCulloch Street. A male exited from the rear door behind the driver. With reference to the viewing log, DC MacDonald described him as follows:

> "Male 2 is described as medium height, medium build wearing a dark face mask or scarf over his face, waist length dark hooded jacket or top with hood up, dark coloured trousers and dark coloured trainers, shoes and possibly gloves."

[11] He walked away from the vehicle and briefly returned to it to speak to someone in the rear seat. Then he walked in the direction of the Red Pepper. At this point a male referred to as male 3 exited the rear passenger side and followed him. Male 3 was described as follows:

> "Male 3 was described as medium to tall height, average to slim build, dark coloured jacket, mid, mid thigh length with hood up and it looks as if he is zipping up the jacket as he's following male 2. It looks as if he is wearing black trousers, possibly wearing high length boots".

Both males then walked in the direction of St Andrews Road.

[12] After males 2 and 3 exited the vehicle it reversed and so it was DC MacDonald's view that there had been at least three people in it given that someone had to be driving. Assuming male 1 had been in the car and not returned to it that must have meant that there were at least four people in it at one point.

[13] Male 2 was then seen to meet with male 1 and walk with him towards the wooded area. Male 3 did not appear again on camera. At 2338 the deceased's Audi drove off along St Andrews Road in the direction of Shields Road. At 2339 males 1 and 2 could be seen running back through the wooded area away from St Andrews Road and towards the Q5.

[14] The Q5 was again caught on camera at 2339. The footage showed the deceased's RS4, travelling on St Andrews Road and being stopped at the traffic lights at its junction with Shield Roads. It was in the lane for turning right. The Q5 was seen travelling in the same direction. When the RS4 moved off at the traffic lights it took a turn onto Shields Road.

[15] At a later stage the Q5 was seen crossing North Street at the junction with St Vincent Street going through a red light. It then travelled north on North Street towards the slip road for the M8 in the direction of Edinburgh. DC MacDonald confirms that that route would allow access to Bracken Street where the Q5 was found burned out the next day.

The vehicle

[16] Mrs Brown, an eye-witness spoke to seeing the Q5 parked on McCulloch Street at approximately 2330 hours. She noted the registration number. Another witness, a Mr Sadiq, spoke to seeing a Q5 next to Mr Johnston's vehicle at the traffic lights. He heard loud bangs which sounded like gunshots. An off duty police officer, Alistair McDonald, also noted a vehicle's registration after seeing it travelling along Scotland Street and being concerned about the manner in which it was being driven. His record of the registration number matched that of Mrs Brown. The following day the same vehicle, as we have indicated, was found burned out in the north of the city. It had been reported as stolen in May 2016. Within the wreckage there was found a bullet cartridge. Following analysis, the cartridge was found to have been discharged from the same firearm as a cartridge recovered from Mr Johnston's car. The Q5 could thus be linked to the crime and this, the Crown submitted, meant that it could be declared the crime scene.

Fragments and DNA analysis

[17] A fragment of fabric (Crown Label 29) was found within the burned out Q5. It was agreed that the fragment had been of a Nike Windrunner High Tech knit hooded jacket which was available for sale from October 2016. The item had a central zip. Also found within the vehicle was a burned item of clothing identified as having been a Russell Athletic hooded top (Crown Label 30). Replicas of the items were used during the trial. These were Crown Labels 31 and 32. The Nike jacket was available for sale through nine Nike stores in

the UK, including one in Glasgow. A total of 119 of the jackets were sold in store. They were also available to purchase online but it was unknown how many were so purchased. It was a matter of agreement that the hooded tops worn by two of the males in the Q5 could not be excluded from being the Nike jacket and the Russell Athletic top. The males in question were males 2 and 3, as enumerated in the evidence of DC MacDonald. We will revert to this in relation to the second ground of appeal.

[18] Following analysis, DNA matching that of the appellant and his girlfriend SL was found on the fragments of the Nike, as follows.

[19] According to the scientific evidence, part of a hood, neckline, drawstring and toggle and central zip fastening were present in the fragment of the Nike. A side pocket with a zip and zip mechanism with attached toggle were intact. A taping from the left side of the zip pocket was analysed and a mixed DNA profile was obtained containing DNA from a male major contributor, a minor contributor and a trace of DNA from two other individuals. The appellant's DNA matched that of the major contributor and that of SL matched that of the minor contributor. It was greater than one billion times more likely if the DNA originated from the appellant and three others rather than four other individuals unrelated to him. As far as SL was concerned, it was also greater than one billion times more likely if the DNA originated from her and three others rather than from four other individuals unrelated to her.

[20] The zip tool mechanism/cord knot of the pocket and the cord fabric were separately analysed and a mixed DNA profile was obtained from each, containing DNA from a male major contributor and at least three other individuals as minor contributors. The profile of the male major contributor in both of these mixed profiles matched the DNA profile of the appellant. No statistical evaluation of those results was performed.

[21] In the opinion of the scientists the finding of a major DNA profile matching the appellant within the mixed DNA profile from the left side of the zip pocket would be explained if the appellant had been a regular wearer of the item. We presume that "would" should read "could". The finding of the DNA profile matching SL could be explained if she was a wearer of the item or if her DNA had been deposited through another mechanism.

No case to answer submission

[22] At the close of the Crown case counsel for the appellant made a submission of no case to answer in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 on the basis that there was insufficient evidence. That was repelled and is now reflected in the first ground of appeal.

Ground 1 – insufficient evidence

Submissions for the appellant

[23] There was no positive identification of the Nike jacket being worn by anyone when the crime was committed. None of the occupants of the Q5 could be identified from the CCTV footage. The Q5 had been at large from May 2016, having been stolen then, and the Nike jacket could have been left in it at any time from October 2016 onwards. A legitimate inference could have been drawn that the appellant's DNA and that of his girlfriend SL was deposited on the Nike jacket at the same time. There was no suggestion that she was in the car at the time of the shooting hence her DNA must have been deposited prior to the murder. The tops worn by the three males seen in the CCTV footage did not have any distinguishing features, other than the length of the top worn by male 3. The DNA evidence found on the fragment was insufficient for an inference to be drawn that the appellant was involved in the commission of the crime. *Maguire* v *HM Advocate* 2003 SLT 1307 was

distinguishable. It could not be said that the jacket was purpose built for a criminal enterprise.

[24] There was no evidence that the top was worn or used during the commission of the crime, albeit it was found in the burned out Q5. *Hamilton* v *HM Advocate* 1934 JC 1 and *Langan* v *HM Advocate* 1989 JC 132 could be distinguished and the proper approach was set out in *McPherson* v *HM Advocate* [2019] HCJAC 21, 2019 at para [10]. No inference of guilt could be drawn in this case because there were four different contributors of DNA, albeit the appellant was the major contributor.

Submissions for the Crown

[25] The Crown also referred to *McPherson* at paragraphs [8]-[10]. There would be sufficient evidence in law if one reasonable inference from the presence of an accused's DNA was that the accused committed the crime. The fact that there were other innocent explanations was immaterial to the question of sufficiency. The presence of the appellant's DNA on the Nike jacket should not be viewed in isolation. It was found in a burned condition within a car which had itself been burned out very shortly after it had been used in the commission of a murder. Other clothing was also burned within the vehicle. The entire scenario had all the hallmarks of an organised, targeted assassination: the theft of the car in advance, the reconnoitring of the deceased, an apparently planned escape route and a determined attempt to destroy evidence which might link the perpetrators to the crime. A key part of that attempt was the burning of clothing within the vehicle. It was an entirely reasonable inference to draw that the clothing which was destroyed had been worn by the perpetrators during the commission of the crime and the purpose of destroying it was to avoid detection. The evidence in the present case "fitted together to form a real and convincing pattern" (*Al Megrahi* at paragraph [368]). The appellant's DNA was deposited on

the Nike jacket at some point between October 2016 and the moment the Q5 was set alight. Whilst the exact point at which it was deposited could not be identified, it was reasonable to conclude that the appellant was the main contributor to the mixed DNA sample recovered because he was the last person to wear the garment before it was burned. The suggestion that there were innocent explanations for his DNA being on the top did not preclude there being a sufficiency of evidence.

Ground 3 – defective representation in relation to a joint minute

Background

[26] Iain McArthur, a specialist in forensic audio and video enhancement, had been asked by the police to examine the CCTV footage to undertake a height estimation, to compare clothing and footwear worn by the suspects (*sic*) at McCulloch Street and St Andrews Road and to make other investigations which are of no relevance for present purposes. As well as the CCTV footage he was provided with certain reconstruction footage involving a police officer wearing certain footwear and the new Nike jacket and Russell Athletic tops which had been procured. While there is reference in his report, production 39, to "suspects", it would appear that in fact he only considered one suspect, namely male 2. He concluded that there was support for the assertion that the Nike jacket and the Russell Athletic top were the same make and model as those worn by the suspects (*sic)*. "Support" had a specific meaning in the context of Mr McArthur's report. In his scale from "lends no support" to "lends powerful support", "support" was the third strongest. Ultimately, for reasons which will become apparent below, he did not give evidence during the trial.

[27] Following certain discussions between senior counsel who then appeared for the appellant and the advocate depute, a joint minute (No 4) was entered into. Amongst other things it contained the following agreement:

> "The hooded tops worn by males 1 and 2, as described by Crown witness Detective Constable Sheila MacDonald in her evidence, cannot be excluded from being a Nike Tech Knit Windrunner hooded top (similar to Crown Label 31) and a Russell Athletic hooded top (similar to Crown Label 32). It is the case that manufactured items can share identical proportions and features. Mass manufactured clothing may look identical unless distinguished by unique features such as a mark, addition or damage."

[28] During the course of the no case to answer submission the trial judge queried whether the terms of the minute were accurate. The advocate depute and senior counsel agreed that the minute should refer to males 2 and 3 rather than to males 1 and 2. The joint minute was thereafter amended.

[29] It is said in the Note of Appeal that the joint minute as amended was factually incorrect. It did not accord with the opinion evidence of Mr McArthur, which only related to male 2. The appellant was purportedly male 3. There was no evidence potentially available that the Nike could not be excluded as being the garment worn by male 3. The agreement was not entered into with the consent of the appellant. His representatives had not examined the replica Nike jacket, taken photographs of it or shown it to the appellant. They did not examine the CCTV footage. The decision to agree the joint minute was not a tactical or strategic one made in the proper exercise of professional judgment. It helped the Crown to link the appellant with the Q5. The appellant was denied a fair trial.

[30] The difficulty in a nutshell was that the evidence disclosed that the garment worn by male 3, according to the evidence of DC MacDonald and, as the jury could see for themselves, was mid-thigh length. Photographs of the Nike in the reconstruction showed that it came to the waist of the police officer wearing it. The Nike and the Russell Athletic

tops could not be excluded as the garments worn by males 1 and 2, as the joint minute correctly stated before it was amended but neither of them had been the jacket worn by male 3. Given the extremely thin nature of the evidence relied on by the Crown this was a matter of the greatest relevance and materiality.

"Anderson" response by senior counsel

[31] According to senior counsel who represented the appellant at the trial, he did not generally seek instruction to agree evidence, although he would do in some cases. Parliament had obliged him to agree that which responsibly could be agreed and the court expected that obligation to be met. He accepted that there required to be an evidential basis for agreements. The amended joint minute took account of the evidence and reconciled the numbering. There was a third individual captured on CCTV footage. He had not examined the replica top but had considered it online. Neither did he discuss it with the appellant in any detail, seeing little point in doing so. The appellant was aware that the replica top would be produced at trial, having been made aware of it at police interview. His defence was that the clothing fragment recovered, bearing his DNA, came from a moveable object which must have found its way into the car but he offered no positive position as to how it got there. He did not think it necessary or appropriate or having any evidential potential to have the appellant wear the garment. Having watched the video evidence, he was satisfied that he would be able to cross-examine witnesses and neutralise the value of the evidence. He had in fact viewed the footage. Mr McArthur's report was not the sole basis for his agreement of evidence. The evidence of DC MacDonald was a substantial basis. When he cross-examined her, she accepted that there was no image that showed any distinct feature of either of the dark hooded tops that would allow identification of a particular manufacturer nor any feature so distinct to allow it to be described as similar to either

Crown Labels 31 or 32. She was not able to point to any frame which allowed her even to distinguish between the two tops worn by the individuals never mind allowing any meaningful comparison with the replicas which were produced. Her evidence amounted to being able to say that two of the three individuals were wearing dark hooded tops. There was a third individual, according to senior counsel, who was wearing a longer coat but he formed no part of the comparison work, as his clothing was distinctive. The fragments of the burned clothing cold not have come from that top. They came from waist length sports tops.

[32] The benefits of entering into the joint minute were that he was able to persuade the Crown not to call Mr McArthur so that the evidence that there was support for the assertion that the Nike and Russell Athletic tops were the same make and model as shown in the footage would no longer be before the jury. That evidence would have been unhelpful to the appellant.

[33] Secondly, he was conscious of the decision in *Gubinas* v *HM Advocate* 2017 SCCR 463 to the effect that the jury could reach their own conclusions as to what was shown in footage. By agreeing the joint minute this discretion was removed by the jury.

[34] In a later note dated 5 December 2019 senior counsel noted:

> "I did not view 'male 3' as having such a long upper garment. I cannot now say definitively why I did not raise the matter in cross-examination. Suffice to say I did not conclude that the Nike jacket could be excluded from being the top worn by 'male 3', nor could I exclude it as being worn by 'male 2'. My cross-examination of DC Sheila MacDonald was to focus on the limitations of video footage viewing and lack of ability to distinguish garments. Having obtained the concession in my ultimate questions of her that she could not, from footage alone, distinguish between the two tops … I considered that I had neutralised the import of clothing identification. I was content with that, and it was this that caused me to discuss with the Crown whether we could potentially agree a form of words to prevent Mr McArthur being called to give evidence".

He confirmed that Mr McArthur did not carry out a comparison exercise in relation to male 3.

Submissions for the appellant

[35] The Crown had relied on evidence of male 3 exiting the Q5 and apparently zipping up a top. While the Nike top had a zip, the length of male 3's jacket was such that it could not have been the Nike or the Russell Athletic top but because of the joint minute, arising from senior counsel's mistaken understanding of Mr McArthur's report, the jury were bound to accept that it could have been the Nike. The advocate depute had told the jury that "that does not take us far" but it was another strand to be combined with other evidence and he repeatedly referred to it. In her charge to the jury, the judge also referred to the Crown's position about the zip. Had the joint minute remained in its original form the advocate depute could not have invited the jury to draw the inference which he did.

[36] The appellant could not have been male 3, at least if he was wearing the Nike. The height of male 2, albeit not led in evidence, was not consistent with being the appellant and it was said not to be the Crown position that the appellant was male 1.

[37] The Crown, the defence and the judge having all proceeded on the basis that it was a reasonable inference to make that male 3 wore the Nike, it would be likely that the jury would fall into the same error.

[38] Ms Mitchell accepted that the length of the jacket worn by male 3 was critical. It was clear from the evidence of DC MacDonald and the video footage that it was a thigh length jacket and there had been no challenge to that evidence. It would have been perverse for the jury to proceed on any other basis without the agreement and the jury could not have been invited to infer that the appellant was linked to the top.

[39] In further submission for the appellant, senior counsel submitted that the context of not being able to discern between the tops in the reconstruction was only in relation to male 2. No reconstruction was done in relation to male 3 and a thigh length top.

Submissions for the Crown

[40] There was an evidential basis for agreeing the joint minute. It did not state that the men were wearing a Nike and/or a Russell Athletic top, just that they could not be excluded. That was consistent with the evidence of DC Macdonald. The fact that a garment worn by male 3 was described as being mid-thigh length and that the two hooded tops were waist length did not in itself take away the evidential value of the overall description she gave. It was erroneous to say that male 3 could not be wearing one of the hooded tops by reference to its length. The advocate depute in his speech to the jury accepted that the joint minute did not take the Crown case very far. Senior counsel's decision was a tactical one which he was entitled to make. The jury could have drawn a conclusion that the Nike hoodie was worn by a male in the CCTV footage. By entering into a weak agreement the stronger positive evidential inference was removed from the case. The appellant was not deprived of his opportunity to present his defence and the agreement of the joint minute did not prevent him having a fair trial.

[41] The description of a mid-thigh jacket as opposed to waist length jackets was against a background of a very short, grey segment of footage which the jury saw. The Nike top could not be excluded as having been worn by male 3. The cross-examination of DC MacDonald had to be taken into account. During that exercise, the following exchange took place:

> "In relation to what you see of individuals moving about a vehicle, at no time are their faces available to you? – No.
>
> At no time is there anything distinctive available to you in relation to clothing? – No.
>
> Would you generally see dark individuals, dark bodies moving about? – Yes.
>
> And that really is as best as you can detect from that footage from your viewing, isn't it? – Yes."

Later on came the following questions and answers:

> "You are looking for things which might, if you wanted a global analysis, start to add towards something else? – Yes.
>
> And it may be that in relation to so doing, you accept the limitations, you cannot, from the raw footage available to you, identify any distinguishing features of upper body clothing at all? – No.
>
> In actual fact, when you had one of the reconstructions carried out, in the same way with each top on, you were unable to distinguish which top had been used in the footage? – Yes."

Decision

Insufficiency of evidence

[42] The general approach to cases involving circumstantial evidence is well understood. See *Al Megrahi* v *HM Advocate* 2002 JC 99. We agree with senior counsel for the appellant that more particular guidance is to be found in the case of *McPherson* v *HM Advocate* [2019] HCJAC 21 at paragraphs [8]-[10]. As is said in paragraph 10:

> "In each situation, reason has to be applied to the proven facts to determine whether it is legitimate to draw the inference of involvement in the crime. This will involve questions of fact and degree. … However, if one reasonable inference from the evidence is that the accused was the, or a, person who committed the crime, there will thereby be a sufficiency of evidence, notwithstanding the existence of other possible explanations. It is only if the inference is an unreasonable one that an insufficiency will arise (*Reid* v *HM Advocate,* Lord Justice-General (Carloway), para [18] citing *Hamilton* v *HM Advocate* , Lord Sands p 5). Where more than one reasonable inference may be drawn, or if the inference is one which may or may not be drawn, it will be for the fact-finder to determine the result, applying the customary standard of proof. In that situation, the issue is not one of sufficiency of evidence, but one of its quality or strength."

[43] The CCTV footage, the evidence of the eye witnesses, particularly Mr Sadiq, and the finding of a bullet cartridge casing on the road at the locus and another inside the burned out Q5, both of them with markings on them indicating that they had been fired from the same gun, provided ample evidence to implicate the Q5 in the shooting. The footage of the three males associated with the vehicle was sufficient to allow the jury to infer that they were involved art and part. It is likely that there was a fourth person who was driving the vehicle but nothing can be said about that individual.

[44] The fact that the Q5 was burned out shortly after the shooting allowed the inference to be drawn that those who set fire to it were attempting to destroy it because it had been used in the commission of the crime. The burning of the clothing allowed an inference to be drawn that those who were responsible were attempting to destroy it because it had been worn by the perpetrators. As the Crown pointed out in their submissions, the fragments of the Nike Windrunner top and the Russell Athletic top were not the only items of clothing burned within the car. There were other items which could not be identified. The finding of the appellant's DNA on the Nike Windrunner top was consistent with his being the regular wearer of it. The inference that he was the wearer was enhanced by the presence of DNA matching that of his girlfriend. That also lessened the likelihood of the Nike being worn regularly by someone else. A chance encounter with one or other of the appellant and his girlfriend might explain the presence of his or her DNA but two secondary transfers are less likely. There may be many explanations why the DNA was on the jacket and many explanations why the jacket was in the car but the window of opportunity for the jacket to have been left innocently in the car is a narrow one of about a month or so. One reasonable inference from all the evidence is that the appellant was one of those responsible for the shooting. It would have been enough evidence even if the men had not been captured on

CCTV. As it is, the fact that three men wearing hooded clothing were seen and the fragments of clothing which were burned included parts of two hooded tops merely adds to the sufficiency and renders the evidence more compelling.

[45] There is no merit in this ground.

Defective representation

[46] There is no basis for the suggestion in the Note of Appeal that the appellant's previous representatives did not examine the CCTV footage. It was not necessary for them to show the replica garment to the appellant or to examine it for themselves. Neither was it necessary to take photographs of it or show photographs to the appellant. It was not necessary for senior counsel to take the instructions of the appellant before signing the joint minute. See *Ashif (Mohammed)* v *HM Advocate* [2015] HCJAC 100. It is said, however, that there was no evidential basis for entering the joint minute and in doing so the representatives did not make a tactical or strategic decision in the proper exercise of professional judgment. It was a decision which counsel of ordinary skill and competence should not have made and was said to be grossly prejudicial to the appellant's defence.

[47] As was put at paragraph [45] of the opinion of the Lord Justice Clerk (Gill) in *Woodside* v *HM Advocate* [2009] HCJAC 19, an *Anderson* appeal

> "is not a performance appraisal in which the court decides whether this question or that should not have been put; or whether this line of defence or that should or should not have been pursued. The appellant must demonstrate that there was a complete failure to present his defence either because his counsel or solicitor advocate disregarded his instructions or because he conducted the defence as no competent practitioner could reasonably have conducted it (*McBrearty* v *HM Advocate* at paras 34-36, 60; *Grant* v *HM Advocate* at paras 21-23; *DS* v *HM Advocate*). That is a narrow question of precise unlimited scope."

[48] In this very case, in an earlier opinion at [2019] HCJAC 59, the Lord Justice General, giving the opinion of the court, at paragraph [30] pointed out that the central point in the Crown case:

> "… was that the (appellant's) DNA was on a Nike hoodie found in Q5. Whether the CCTV images show that the hoodie worn by one of the persons seen in these images was not the same as the replica Nike hoodie produced at trial misses the point. In that context, showing the replica to the (appellant) or examining it would have served no purpose beyond establishing the obvious. In any event, the (appellant) would have seen the replica and the CCTV images during the course of the trial."

[49] The first issue for us is to determine whether the agreement was contrary to the evidence. The criticism of it is based on a number of fleeting images of male 3. While the comments of DC MacDonald in cross may not have been specifically directed at male 3, they were general in their terms. According to the evidence of DC Macdonald, based on the viewing log, he was medium to tall wearing a dark coloured jacket which was mid-thigh length with the hood up and it looked as if he was zipping the jacket up. Male 2 was described as medium height wearing a waist length dark hooded jacket or top. Male 1 is said by her to be a white male with a dark jacket and hood up.

[50] The jacket worn by male 3 appears to be longer than that worn by male 2. Our own viewing of the CCTV footage tends to confirm that. The senior counsel who appeared at trial for the appellant proceeded on the basis that one of the jackets was longer and that this was akin to a winter sports coat. He termed it a three quarter length coat. By contrast, he said, males 2 and 3 were wearing shorter upper garments.

[51] The length of the garment worn by male 1 does not appear to be referred to in the evidence. However, counsel viewed male 1 as wearing the distinctive clothing on the basis of his own viewing of the footage, which is extremely grainy. He was of the view, from looking at the footage, that the tops worn by males 2 and 3 were shorter.

[52] We are unable to reach any conclusion about the length of the garment worn by male 1 but, as we have said, that worn by male 3 does appear to be longer than that worn by male 2.

[53] It was submitted that the difference was such that if the jury proceeded on the view that the Nike could have been the garment worn by male 3 then they would have been acting perversely. The advocate depute on the other hand submitted that it could not be excluded and that the joint minute, which was always meant to refer to males 2 and 3 and was initially mistaken, was in fact correct.

[54] While we are not in a position to comment on the length of the garment worn by male 1, noting that its length was not referred to in evidence, we find ourselves equally unable to say that the Nike could be excluded as being the garment worn by male 3. We are aware that a garment of the same make and model as the burned out garment was purchased and a similar one was worn by the appellant in photographs for the purposes of a document produced in support of his appeal. It comes to his waist, at least for the purposes of the photographs. There was no evidence which we can find, however, about the size of the garment within the car or whether it could stretch. Agreeing that it was a replica does not tell us anything about these matters. It is not, therefore, obvious to us that the jury could not have held that the Nike was indeed worn by male 3. Even if the fact that it was the same size as the burned out fragment can be taken from its description as a replica, that is not an end of the matter. The photograph shows the garment going to the appellant's waist but it does not confirm that it could go no further.

[55] However, for the purposes of this argument we shall assume that the jury would have been entitled to exclude it as being worn by male 3 in the absence of the joint minute. On this hypothesis, while male 1 was said in evidence to have been wearing a jacket, there

was no evidence as to the length of it and there remains the live possibility that counsel may have been mistaken in a number of respects. In the first place, on one view, he wrongly attributed the longer jacket to male 1 as opposed to male 3. Secondly, he misread the report by Mr McArthur.

[56] His justification for agreeing the joint minute was based both on the evidence of DC MacDonald and the evidence which the Crown proposed to lead from Mr McArthur. He was concerned to ensure as far as possible that there was no positive evidence linking the Nike jacket with the persons who were seen at or about the car. In cross-examination of DC MacDonald he had managed to highlight a number of difficulties with the CCTV footage, as we have outlined. Mr McArthur's report, on counsel's reading of it, provided support for the assertion that the Nike top and Russell Athletic top were worn by males 2 and 3. However, while the report at times refers to "suspects" a close examination of it reveals that in fact it is only dealing with male 2. It says nothing about the clothing worn by male 3 and, of course, there is no comparison with the clothing of male 1. If counsel's reading of Mr McArthur's report was correct, then the joint minute succeeded in diluting the import of it. However, if, as we find, his reading was incorrect not only did the desiderated benefit not accrue to the appellant but an adminicle of evidence was made available to the jury in support of the Crown case.

[57] Ms Mitchell's thesis is that the appellant should have been excluded as being male 3 and that given his height, to which she referred in submissions, he could have been excluded as being male 2. This reduced the possibility that he was any of the males involved.

[58] In amplification of this submission there were lodged on the appellant's behalf an affidavit of a former solicitor along with a photograph showing his height as being at least

6 feet 1 inches. He was wearing trainers, the sole estimated to be 1-2 inches high. He was wearing crown label 1 in the photograph

[59] We cannot take much from these documents, the issue of the height of male 2 not having been canvassed to any significant extent in the trial, the only reference being that the person was of medium height. Mr McArthur's report estimated him as being 5 feet 7 plus or minus one inch but this was not tested.

[60] Let us assume, though, for present purposes that male 2 was not the appellant and that the Nike could be excluded as being the garment worn by male 3. What then?

[61] While there were a number of references in the advocate depute's address to the jury, and indeed in the judge's charge, to the joint minute and the evidence that male 3 might have being doing up a zip, it cannot be said that this was a major plank of the Crown case. The agreement in the joint minute itself is a very weak one.

[62] Furthermore, the evidence of Mr McArthur would have shown that there was support for the Russell Athletic top being worn by male 2, never mind what he might have said about the Nike. That evidence would have given support to the assertion that at least the Russell Athletic top was burned because it had been worn by a perpetrator. The jury would have been entitled to take the view that the burning of the Nike top and indeed the other clothing was for the same purpose. There was, therefore, some benefit in the joint minute as far as the appellant was concerned, even if it might have been thought to have been offset by the mistaken reference in it to the Nike.

[63] In short, therefore, we are not persuaded that it has been demonstrated that the Nike could be excluded as having been worn by male 3. Even if we are wrong about that, the very weak support for the Crown case in the joint minute does not, in our opinion, mean that a miscarriage of justice was perpetrated. The Crown case was not predicated upon the

appellant being either male 2 or male 3 and the jury was not required to proceed upon that basis. Leaving aside the question of the driver, there was also male 1 to take into account.

[64] The main problem for the appellant is the finding of the DNA on the burned top. In *McBrearty (supra),* at para [61] the court concluded that the convictions did not result from any deficiency in representation. The real difficulty for the appellant, which could not be laid at counsel's door, was the evidence in the case. Much the same can be said here. The DNA evidence provides a very powerful basis for the conviction and even if the joint minute had not been entered into we are led to the view that there is no real possibility that the verdict would have been different.

[65] In these circumstances the appeal is refused.